NO. 90-1088

Supreme Court, U.S.
FILED
DEC 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

EVA O. RETTIG, Cross-Petitioner

v.

KENT CITY SCHOOL DISTRICT;
DONNA G. LIGHTEL, In her Official Capacity as Superintendent, Kent Public Schools;
MICHAEL J. CHRIN, In his Official Capacity of Director, Child Study and Special Education, Kent Public Schools;
BOARD OF EDUCATION OF THE STATE OF OHIO;
FRANKLIN B. WALTER, In His Official Capacity as Superintendent for Public Instruction of the State of Ohio, Respondents.

CROSS-PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the parent of a handicapped person who is the prevailing party in an action brought under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. 1983; under the Education of the Handicapped Act as amended by the Handicapped Children's Protection Act of 1986, 20 U.S.C. 1400 *et seq.*; and under the Rehabilitation Act of 1973, as amended in 1986, 42 U.S.C. 2000d-7, is entitled to an award of reasonable attorneys' fees and costs for expert witnesses, including independent educational evaluations and expenses for parent training programs, and expenses for transportation, as part of the costs for actions and proceedings brought after July 3, 1984, and those brought prior to July 4, 1984 which were pending on July 4, 1984?

LIST OF PARTIES

The parties in the courts below were this Cross-Petitioner Mrs. Eva O. Rettig, her son Thomas M. Rettig, the original Petitioner in Case #90-6388, against all Respondents identified in the caption of the case. The original Petition was received in This Court on 27 November 1990.

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To the Honorable William Rehnquist the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mrs. Eva O. Rettig, the Cross-Petitioner herein, prays that a writ of certiorari issue to review the Judgment and Opinion of the Court of Appeals for the Sixth Circuit which affirmed the United States District Court's dismissal under Fed. R. Civ. P. 12(b)(6) without summary judgment in accordance with Fed.. R. Civ. P. 56. As provided by S. Ct. R. 16.1, both the original Petition and this Cross-Petition are prime candidates for a summary reversal for these Petitioners.

OPINIONS BELOW

The Opinion of the Sixth Circuit Court was ordered to be unreported; App. VOL. III AA contains a true copy. VOL. III A contains the unpublished Memorandum

Order of the United States District Court. Court action was preceded by the exhaustion of administrative remedies. Those are included in VOLS. I and II.

JURISDICTION

Petition No. 90-6388, on which this Cross-Petition relies, was received on 27 Nov. 1990. This Court's jurisdiction is invoked under 28 U.S.C. 2106 which provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

CONSTITUTIONAL AND STATUTORY PROVISIONS

In 1986, Congress amended Sec. 615 of the Education of the Handicapped Act (EHA) with the Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. 1415. The text of relevant provisions is included in the App. to the original Petition. VOL.

IV Sec. J.

STATEMENT OF THE CASE

On 5 July 1984, This Court filed its Opinion in Smith v. Robinson, 104 S. Ct. 3457 holding, in part:

> We conclude, therefore, that where the (EAHCA) is available to a handicapped child asserting a right to a free appropriate public education, based either on the (EAHCA), or on the Equal Protection Clause of the Fourteenth Amendment, the (EAHCA) is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

104 S. Ct. at 3470. This holding impacted on Petitioner and Cross-Petitioner's dismissal under Fed. R. Civ. P. 12 (b)(6) by the District Courts in 1986 and in 1989. App. III I 120, 121; A 90, 91, 93.

According to Senate Report No. 99-112 accompanying the HCPA of 1986, Congress specifically enacted the HCPA to overturn Smith. Sec. 2 provides for attorneys' fees as part of the costs to the parents of a handicapped person who is the

prevailing party. Sec. 3 provides that the EHA does not limit the applicability of other laws which protect handicapped individuals, including the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Finally, Sec. 5 of the HCPA authorizes courts retroactively to award attorneys' fees for

> actions or proceedings brought under section 615 of the EHA after July 3, 1984, and actions and proceedings brought prior to July 4, 1984 under such section which were pending on July 4, 1984.

VOL. IV Sec. J. On 4 July 1984, Petitioner and Cross-Petitioner had actions pending both in the Sixth Circuit Court and in the District Court. App. VOL. III F; and VOL. III I. Admin. remedies were exhausted prior to each of those actions. App. VOL. II. Between 12/12/86 and 7/31/87 Petitioner and Cross-Petitioner once more exhausted admin. remedies. VOL. I; they are still praying for the appropriate remedy. VOL. III AA.

This Cross-Petitioner has a vested interest in the full enforcement of her son's --Petitioner in Case # 90-6388-- rights to compensatory special education and related services together with all damages due him: she continues to pray for her statutorily guaranteed opportunity for full participation in the development of Thomas Rettig's free appropriate public education and his pursuit of life and gainful employment in Kent, Ohio; she also seeks the return of the monies spent due to Respondents' refusals.

In 1974, Cross-Petitioner and her husband together with Petitioner attended the parent training program of the Judevine Center for Autistic Children in St. Louis, MO. They had to pay for this service and for the psycho-educational evaluation of Petitioner because (1) Local Respondents refused Petitioner the residential placement the experts at Cleveland Metropolitan General Hospital

had recommended; and (2) they refused to provide the parent training. Std. EDb-215-09 provided for "planning, implementing, and monitoring intervention strategies" to assist parents. VOL. IV Index 1973, p. 47. Further, Sec. 3323.01 specifically made funds available to Local Respondents for this assistance to parents. Index 1974.

In 1975 Petitioner and Cross-Petitioner were hospitalized in Chicago to ascertain Petitioner's allergies. The doctor prescribed a simple "diversified rotary diet." According to this diet, Petitioner could neither purchase nor consume school lunches. His meals had to be specially prepared according to the doctor's instructions. The school refused to teach Petitioner to prepare the simple meals. Thus, for the years 1975-76, 76-77, and 77-78, Cross-Petitioner had to prepare and drive them daily to Petitioner whose class then was housed at the Kent State University School.

20 U.S.C. 1415 provides for "independent educational evaluations" and "hearing rights." App. VOL. IV Sec. J. In 1976, Cross-Petitioner requested that Local Respondents conduct for Petitioner a "multi-factored evaluation" (MF-E). Local Respondents refused to conduct a MF-E in accordance with Std. 3301-51-18(C) which was to serve as the basis of Petitioner's "individualized education program" (IEP) in accordance with Std. 3301-51-18(D). Therefore, in 1978, Cross-Petitioner requested a "due process hearing" which was to verify and require compliance with procedural safeguards, in accordance with State Standards 3301-51-18, of Local Respondents' development and implementation of an appropriate IEP for Petitioner. Such a "due process hearing" required no expert witnesses. However, because no hearing regarding verification with State Standards was provided, Cross-Petitioner was forced to hire several

expert witnesses from the Judevine Center who also conducted their own psycho-educational evaluation of Petitioner.

In 1979, Cross-Petitioner asked Respondent State Board to provide the compliance verification required by EHA's 1415(c). State Respondents refused to verify compliance with State Standards. Although Respondent State Board ordered the State and Local Respondents to seek "expert help in the future planning of Tommy Rettig's educational program," Cross-Petitioner was denied her right to participate; instead Respondents demanded that Petitioner's parents be replaced by parents from two other states. Thus, no MF-E of Petitioner's needs was conducted as required by EHA Regulation 121a.534 and by Respondent State Board. Petitioner's entire pre-school and elementary education was not based on the child study and MF-E required by State Standards.

In 1981, the District Court ordered

Local Respondents to conduct a MF-E in "strict compliance" with procedural safeguards and accorded the right to parental participation. The 1981 "evaluation" denied parental participation, and it failed to meet Std. 3301-51-18(C). Cross-Petitioner sought District Court intervention. Respondents opposed. Therefore, in 1982-83 Cross-Petitioner sought to challenge the bastard evaluation at a "due process hearing." Again, State Respondents refused EHA verification with State Standards and again affirmed Respondents' denial of Petitioner's right to free appropriate public education (FAPE) and services in accordance with procedural safeguards required by State Standards and by the EHA and the Rehab Act. In 1983, Cross-Petitioner filed another action in the District Court. Not unlike the other courts in this case, no procedures were reviewed by this Court either.

In 1984, Respondents refused to conduct the re-evaluation required by EHA Regulation 121a.534. Therefore, Cross-Petitioner paid for an independent educational evaluation by Dr. LaVigna of Los Angeles, CA, an expert in autism. His recommendations might have been implemented for Petitioner by Judge Lambros for school years 1983-84, 84-85, 85-86, and 86-87 had Respondents not opposed the Court's intervention. App. VOL. III I, 66 ff.

Since June 1987, Respondents have been refusing to provide Petitioner any and all services. At that time this law suit under Sec. 1415's "Stay-Put" provision was pending before State Respondents. Thus, in 1987, this Cross-Petitioner paid for another independent educational evaluation and recommendations by that same expert.

Since 1979, Cross-Petitioner has been seeking federal court adjudication of

State Respondents' EHA-violative review procedures of Local Respondents' outright refusals to design and implement for Petitioner an IEP meeting the requirements of relevant O.R.C. sections and of the procedural safeguards of State Standards throughout the years they were obligated so to do: 1970 to 1990 and ongoing.

REASONS FOR GRANTING BOTH PETITIONS

This Court of Last Resort is fervently urged to grant Petition #90-6388 and this Cross-Petition because justice demands adjudication of these federal claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. This lawsuit spans a period of twenty formative years in the life of a person who is handicapped. Petitioner's pre-school and elementary school age years were not adjudicated by any court in accordance with This Court's directive in

Bd. of Educ. of the Hendrick Hudson Central School District v. Rowley, 458 U. S. 176 (1982), at 3051. VOL. III. C 10; D 1, 2; F 4; G 1. Petitioner's high school age years remain dismissed under Fed. R. Civ. P. 12(b)(6) without proper summary judgment required by Fed. R. Civ. P. 56. VOL. III A 101; I 122.

The Opinion of the Sixth Circuit Court is twenty-four lines long, stating in part:

> Having carefully reviewed the briefs of the parties and the record on appeal, we conclude that the district court's analysis found in its memorandum and order of July 28, 1989 was correct. Because we agree with the reasoning articulated by the district court as the basis for the dismissal, issuance of a written opinion by this court would be duplicative and serve no useful purpose.
> Furthermore, it appears that the case is moot, since in view of Thomas age, it appears that he is no longer entitled to the protections and benefits of the Act which limits eligibility to children between the ages of three and twenty-one years of age. Honig v. Doe, 484 U.S. 305, 318 (1988).
> Accordingly, for the reasons stated, the orders of the district court dismissing the action and denying a new trial are affirmed.

VOL. III AA 8. Cross-Petitioner relies on the briefs she filed in the court below as well as on the three administrative records which no administrative agency nor federal court has yet reviewed. This Court's Clerk's Office received as the App. to the original Petition, as required by S. Ct. R. 14(k): two VOLS. constituting the administrative record; one VOL. court proceedings which are necessary because those proceedings remain wrongfully applied as a bar to the present action; and one VOL. containing the text of federal and Ohio laws.

As the record shows, Petitioner requested his own "due process hearing" under O.R.C. Sec. 3323.05 some six months before he turned twenty-two. O.R.C. Sec. 3323.01(A) provides special education and related services to "handicapped children" under twenty-two years of age. In his petition, he has asked This Court to

adjudicate under the Due Process and Equal Protection Clauses State Respondents' EHA-violative review procedures of the so-called special education accorded him by Respondents under all applicable sections of the Ohio Revised Code and in accordance with procedural safeguards required by all State Standards. He pleads for the "independent decision" which the EHA guarantees him and which State Respondents have been denying him. The federal court judgments have been applied as a bar and are unjust and manifestly wrong.

This Cross-Petitioner also has exhausted all administrative remedies. She has been a party-plaintiff since 1978 and in This Court joins Petitioner in fervently praying for the appropriate remedies under the EHA and Section 504's implementing regulations; and she pleads for the return of the monies Respondents' actions and refusals required her to spend

over the years involved in this lawsuit.

Following This Court's decision in Burlington School Committee v. Dept. of Educ. of Massachusetts, 471 U.S. 359 (1985), courts have fashioned appropriate remedies for school systems' violations of the EHA.

In Burlington, the father of a handicapped child withdrew his son from the public school and enrolled him in a private school. After completion of administrative and judicial review of the public school's educational program for his son, This Court awarded the father the reimbursement for the private school tuition. Section 1415(e)(2) of the EHA provides for judicial review of the administrative decisions, and requires that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party ... and shall grant such relief as

(it) determines is appropriate." Chief Justice Rehnquist reasoned for a unanimous Court:

> The ordinary meaning of those words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act.

Burlington, 471 U.S. at 369. This Court added that since administrative and judicial review could take years to complete, more than mere prospective injunctive relief is required when fashioning an appropriate remedy.

> ... we are confident that by empowering the court to grant "appropriate" relief, Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case. ... Reimbursement merely requires the Town to belatedly pay expenses that it should have paid in the first instance had it developed a proper IEP...

Id., 471 U.S. at 371.

Based on the reasoning in Burlington, other courts have determined that

compensatory education is an appropriate remedy. In Miener v. State of Missouri, 800 F2d 749 (8th Cir. 1986), the father of a handicapped daughter sought compensatory education for her because she had been denied special education in accordance with several evaluations recommending such services. The father was unable to pay for private placement; the school district argued that the Burlington reasoning did not apply. The Court of Appeals rejected that argument:

> We cannot agree with the defendants that they should escape liability for these services simply because Clyde Miener was unable to provide them in the first instance; we believe that such a result would be consistent neither with Burlington nor with congressional intent. Like retroactive reimbursement in Burlington, imposing liability for compensatory educational services on the defendants "merely requires (them) to belatedly pay expenses that (they) should have paid all along," 105 S.Ct. at 2003. Here, as in Burlington recovery is necessary to secure the child's right to a free appropriate public education. Id. We are confident that Congress did

> not intend the child's entitlement to a free education to turn upon her parent's ability to "front" its costs.

Miener, 800 F.2d at 753 (emphasis in original). The court then articulated the standard of "appropriateness":

> Accordingly, we hold that the plaintiff is entitled to recover compensatory educational services if she prevails on her claim that the defendants denied her a free appropriate education in violation of the EHA.

Id., at 754. The Court then remanded the case for a determination on the merits, even though the "child" was at least 24 years old when the Eight Cricuit decided the case (since she was 14 in 1976; Id., at 751).

The Eleventh Circuit Court reached the same conclusion as the Eighth. Seven months after the Honig decision was issued, in Jefferson County Bd. of Educ. v. Breen, 853 F.2d 853 (11th Cir. 1988), that court affirmed both an award of tuition reimbursement and compensatory

education. In addition to the Miener Court's reasons, the Breen Court stated:

> Also, providing a compensatory education should serve as a deterrent against states unneccessarily prolonging litigation in order to decrease their potential liability.

Breen, 853 F.2d at 858.

The Second Circuit has also awarded compensatory education in Burr v. Ambach, 863 F.2d 1071 (2d Cir. 1988), vacated sub nom. Sobol v. Burr (1989), 109 S. Ct. 3209 (1989), reaffirmed, No. 116-88-7275, 16 EHLR 151 (2d Cir. Oct. 27, 1989. The Court of Appeals remanded the case to the district court with instructions to reinstate the administrative hearing officer's decision which had originally awarded the compensatory education. Id.

The most recent award of compensatory education was made in Lester H. v. Carroll 16 EHLR 10 (E.D. Pa., Nov. 9, 1989):

> Honig does not preclude an award of compensatory education beyond the age of 21 for denial of an appropriate

> education before 21. The issue in Honig was denial of education pending EHA procedural due process; Doe or Smith did not suffer significant deprivation of an appropriate placement since the district court had directed Doe's return to school and provided Smith with in-home instruction to which his parents agreed... The power to suspent and length of suspension were the issues in Honig, not compensatory education to rectify educational deprivation. Honig does not bar relief after age 21, as long as plaintiff is under 21 when the violation occurs. Liability terminates at 21 but if there is liability, an award of damages is not so limited.

Id. at 14, emphasis added. After a review of the case law, the Lester Court awarded compensatory education. Id.

While this Cross-Petitioner has spent considerable sums of money from the family's finances in behalf of Petitioner, none of the expenditures resulted in special education and related services appropriate to Petitioner's unique educational needs. For Petitioner, only compensatory special education and related services specifically designed for his

identified needs together with all damages due him under the circumstances will be appropriate and meaningful. Cross-Petitioner pleads Petitioner be granted such appropriate relief as well as any and all damages that will make him whole.

Because Petitioner is entitled to compensatory FAPE, services and damages, Cross-Petitioner further urges This Court to provide for the return of the following monies: (1) The 1974 psycho-educational evaluation and parent training at the Judevine Center for Autistic Children which was necessary to keep Petitioner in his home when Respondents refused him the residential placement then prescribed for him by the experts at Cleveland Metropolitan Hospital in 1974. (2) The 1975-76, 76-77, 77-78 car and travel expense for delivering Petitioner's lunches to the University School because Respondents refused to teach the then 12-, 13-, 14-year-old to prepare the simple

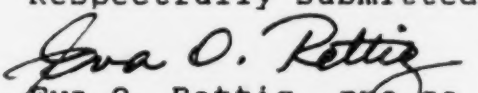
meals prescribed by Petitioner's physician when the other classmates were being taught to prepare their meals. (3) The , 1979 psycho-educational evaluation of Petitioner by Judevine staff necessitated by the so-called due process hearing. (4) The 1984 psycho-educational evaluation by Dr. LaVigna, a nationally renowned expert in autism, which was necessary because Respondents refused such appropriate expert help and which might have been used by Judge Lambros (1983-87) to fashion a remedy had Respondents not objected. (5) The 1987 psycho-educational evaluation by Dr. LaVigna when Petitioner was dismissed from school and denied any and all services despite this law suit's pendency, under the EHA's "Stay-Put" provision, before State Respondents. (6) All expenses, fees, costs, including fees for attorneys and expert witnesses for the entire litigation, 1978-90 and ongoing.

CONCLUSION

Since the decision in Burlington, courts and administrative review officers have fashioned appropriate relief for handicapped children and their parents, including awarding compensatory education beyond the age limits set by States who receive funding under the EHA. The decision in Honig did not bar this remedy; it was not at issue. Honig merely held that an issue of school discipline was moot with regard to a handicapped child who was no longer in school and who had received his FAPE while of school age. Honig v. Doe, 484 U.S. 305, 318 (1988).

Cross-Petitioner humbly begs this High Court of Last Resort for an appropriate remedy for Petitioner Thomas M. Rettig and for herself.

Respectfully submitted,



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